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No. 87-.....

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1987

TEXAS EASTERN TRANSMISSION CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

J. EVANS ATTWELL,
Counsel of Record
DAVID T. ANDRIL
D. VIRGINIA SMITH
Vinson & Elkins
1001 Fannin Street
Houston, Texas 77002-6760
(713) 651-2222

JUDY M. JOHNSON
Texas Eastern Transmission Corporation
P.O. Box 2521
Houston, Texas 77252

Attorneys for Texas Eastern Transmission Corporation

December 14, 1987

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission possesses statutory authority to impose common carrier obligations on natural gas pipeline companies.

PARTIES TO THE PROCEEDING

The following parties appeared in the proceedings before the court of appeals:

Air Products and Chemicals, Inc.
Alabama-Tennessee Natural Gas Company
Algonquin Gas Transmission Company
American Bakers Assocation
American Gas Association
American Iron & Steel Institute
American Paper Institute, Inc.
American Public Gas Association
Amoco Gas Company
Amoco Production Company
ANR Pipeline Company
Arco Oil and Gas Company
Arizona Electric Power Cooperative, Inc.
Arizona Public Service Company
Arkla, Inc.
Armstrong World Industries
Ashland Corporation
Ashland Exploration, Inc.
Associated Gas Distributors
Association of Texas Intrastate Natural Gas Pipelines
Atlanta Gas Light Company
Baltimore Gas and Electric Company
Bethlehem Steel Corporation
Brooklyn Union Gas Company
Cabot Corporation
Carolina Utility Customers Association, Inc.
Cascade Natural Gas Corporation
Central Illinois Light Company
Champlin Petroleum Company
Chemical Manufacturers Association
Chevron U.S.A. Inc.
Cities Service Oil and Gas Corporation
Citizens Energy Corporation

City of Willcox, Arizona
Colorado Interstate Gas Company
Columbia Gas Distribution Companies
Columbia Gas Transmission Corporation
Columbia Nitrogen Corporation
Commonwealth of Kentucky Public Service Commission
Conoco, Inc.
Consolidated Edison Company of New York, Inc.
Consolidated Gas Transmission Corporation
Consumers Power Company
CP National Corporation
Delhi Gas Pipeline Corporation
Diamond Shamrock Exploration Company
El Paso Natural Gas Company
Elizabethtown Gas Company
Entex, Inc.
Exxon Corporation
Fertilizer Institute
Florida Gas Transmission Company
Foothills Pipe Lines (Yukon) Ltd.
Gas Distributors Information Service
Interstate Natural Gas Association of America
K.N. Energy, Inc.
Kerr-McGee Corporation
Kansas Power and Light Company
Laclede Gas Company
Louisiana Intrastate Gas Corporation
Marathon Oil Company
Maryland Industrial Group
Maryland People's Counsel
Memphis Light, Gas and Water Division
MESA Operating Limited Partnership
Michigan Consolidated Gas Company
Michigan Gas Storage Company
Michigan Public Service Commission
Minnesota Public Utilities Commission

Mobil Oil Corporation
Monterey Pipeline Company
National Association of Regulatory Utility Commissioners
Natural Gas Pipeline Company of America
Nipro, Inc.
North Shore Gas Company
Northern Illinois Gas Company
Northern Natural Gas Company
Northern Valley Environmental Council
Northwest Central Pipeline Corporation
Northwest Gas Company
Northwest Pipeline Corporation
Ohio Oil and Gas Association
Oklahoma Natural Gas Company
Pacific Gas and Electric Company
Pacific Gas Transmission Company
Pan-Alberta Gas, Ltd.
Panhandle Eastern Pipeline Corporation
Panhandle Producers and Royalty Owners Association
Pennsylvania Public Utility Commission
Pennzoil Company
Peoples Gas Light and Coke Company
Phelps Dodge Corporation
Philadelphia Electric Company
Phillips Petroleum Company
Piedmont Natural Gas Company
Placid Oil Company
Process Gas Consumers Group
Producer's Gas Company
Public Service Commission of the State of New York
Public Service Electric and Gas Company
Public Utilities Commission of the State of California
Salt River Project Agricultural Improvement and Power District
Shell Offshore, Inc.
Shell Western Electric and Power Inc.

Sohio Petroleum Company
South Carolina Pipeline Corp.
South Jersey Gas Company
Southern California Gas Company
Southern Indiana Gas and Electric Company
Southern Natural Gas Company
State Corporation Commission of the State of Kansas
State of Connecticut
State of Louisiana
State of Michigan
Sun Exploration and Production Company
Tenneco Oil Company
Tennessee Gas Pipeline Company
Tenngasco Corporation
Texaco, Inc.
Texas Eastern Transmission Corporation
Texas Gas Exploration Corporation
Texas Gas Transmission Corporation
Transcontinental Gas Pipe Line Corporation
Transok, Inc.
Transwestern Pipeline Company
Trunkline Gas Company
UGI Corporation
Union Oil Company of California
United Distribution Companies
United Gas Pipe Line Company
Valero Transmission Company
Washington Gas Light Company
Washington Natural Gas Company
Weirton Steel Corporation
Westcoast Transmission Company Limited
West Virginia Consumer Advocate
Wisconsin Power & Light Company

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v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Texas Eastern Transmission Corporation ("Texas Eastern")[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at *Associated Gas Distributors* v. *FERC*, 824 F.2d 981 (D.C. Cir. 1987), and is reproduced in the Joint Appendix ("JA") compiled by Texas Eastern, the Interstate Natural Gas Association of America and the Arizona Electric Power Cooperative, Inc. The order of the Federal Energy Regulatory Commission ("FERC" or "Commission") is reported at *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, 1981-85 FERC Reg's Preambles (CCH) ¶ 30,665

[1] Texas Eastern is a wholly owned subsidiary of Texas Eastern Corporation.

(1985) ("Order No. 436"), and limited excerpts from it are reproduced in the JA.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1987. *See* JA at 147a. Petitions for rehearing were denied on September 15, 1987. *See* JA at 145a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTES INVOLVED

This case involves the interpretation of sections 5 and 7 of the Natural Gas Act, 15 U.S.C. § 717d and § 717f (1982), and sections 311(a) and 602(b) of the Natural Gas Policy Act of 1978, 15 U.S.C. § 3371(a) and § 3432(b) (1982). *See* JA at 153a-164a.

STATEMENT OF THE CASE

The decision of which Texas Eastern seeks certiorari approves actions of the FERC that effect fundamental changes in the structure of the natural gas industry. Natural gas pipelines have traditionally functioned as integrated merchants and transporters of gas. Historically, pipelines have contractually agreed to incur utility obligations to supply natural gas to local distribution companies, which resold gas to consumers. To meet these utility obligations, pipelines have purchased gas from numerous producers at or near the point of production and transported the gas from these many sources in a commingled stream to the point of resale to the local distribution companies.

This structure was dramatically altered when, on October 9, 1985, the FERC issued Order No. 436. The court below described the FERC's action as contemplating "a complete restructuring of the natural gas industry." JA at 17a. The court of appeals further observed that these

changes would rank among the regulatory milestones of the industry.

In its order the FERC stated that certain changes in the natural gas industry since the 1938 enactment of the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717-717w (1982), necessitated a restructuring of its role in regulating the industry. Two such developments assumed particular importance in the FERC's eyes: first, the development of a nationwide network of pipelines now enables gas to be moved between virtually any two points in the nation. Second, the stimulation of natural gas production that followed Congress' enactment of the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301-3432 (1982), has created an increasingly competitive market for gas at the wellhead. In light of these developments, the FERC envisioned that its role in the regulation of the sale of gas as a commodity would decline, while its role in the regulation of the transportation of gas would continue. To adjust its regulations accordingly, the FERC determined that it was necessary to disintegrate (or, in the jargon of the industry, "unbundle") the merchandising of gas and the providing of transportation services.

Order No. 436 achieved this unbundling by dictating that all transportation provided pursuant to section 311 of the NGPA or under authority of blanket certificates of public convenience and necessity issued under section 7 of the NGA would comply with certain conditions, two of which are of particular importance. First, the pipelines' firm sales customers would have to be afforded the unilateral right to reduce or eliminate their pre-existing, privately negotiated contractual obligations to purchase gas from the pipelines so that they could buy gas directly for their own account in the increasingly competitive wellhead market. Second, the pipelines would have to offer "open access," or transportation service on equal terms to every potential shipper so that gas

could be shipped readily by anyone from the wellhead to the pipelines' former sales customers.

This "open access" requirement shifted the entire focus of natural gas pipeline companies' obligations. For nearly fifty years of regulation under the NGA, pipelines had been viewed as having utility-type service obligations to consumers of natural gas. Under Order No. 436, in contrast, pipelines would have common carrier obligations to shippers of gas, who are in many cases producers and brokers of natural gas.

Scores of parties representing all segments of the natural gas industry petitioned the United States Court of Appeals for the District of Columbia Circuit to review Order No. 436. While the court of appeals remanded the order to the FERC to rectify certain problems the court perceived in the order, the court upheld the fundamental premise underlying Order No. 436, *i.e.*, that the FERC had statutory authority to mandate open access transportation.[2]

In Order No. 436 the FERC skirted the issue of whether it had authority to impose common carrier obligations on gas pipelines by arguing that it had not mandated open access because a pipeline's decision to transport subject to Order No. 436 was voluntary. The court of appeals rejected the FERC's rationale for avoiding the statutory authority question, and instead directly addressed the issue of the Commission's power to mandate open access transportation under the NGA and the NGPA. The court concluded that the Commission had authority under the NGA to issue remedial

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[2] On August 7, 1987, the FERC issued its order on remand that addressed the infirmities in Order No. 436 that the court of appeals had noted. The FERC retained the open access requirement. *See Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol,* III Fed. Energy Guidelines (CCH) ¶ 30,761 (1987).

orders that would have the effect of imposing common carrier obligations on gas pipelines. JA at 26a-29a. The court also sustained the Commission's authority to impose the open access requirement on transportation under the NGPA. JA at 34a-39a.

REASONS FOR GRANTING THE WRIT

1. Certiorari should be granted to reverse the unwarranted expansion of the Federal Energy Regulatory Commission's authority by the court below.

The decision below reflects an expansive view of the FERC's statutory authority to impose common carrier obligations that even the Commission has not advanced. The court has bestowed upon the FERC powers that Congress considered and denied the Commission in the context of the NGA. In the NGPA Congress expressly prohibited the Commission from exercising such powers. This Court must grant certiorari to correct this frustration of Congressional intent.

a. The Commission's Order No. 436 imposes common carrier obligations on pipelines.

The open access requirement of Order No. 436, which compels pipelines to transport for any party that requests service, constitutes a common carriage obligation. The obligation to provide service without discretion is the essence of common carriage. *See FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979). In *Midwest Video* this Court found that the imposition of a requirement that divested cable television system operators of discretion to determine who could use certain channels imposed a common carrier obligation on those operators:

> With its access rules, however, the Commission has transferred control of the content of access cable channels from cable operators to members of the public who wish to communicate by the cable medium. Effectively,

> the Commission has relegated cable systems, *pro tanto,* to common-carrier status. . . . A common carrier does not 'make individualized decisions, in particular cases, whether and on what terms to deal.'
>
> The access rules plainly impose common carrier obligations on cable operators. Under the rules, cable systems are required to hold out dedicated channels on a first-come, nondiscriminatory basis.

Id. at 700-01 (citations omitted). Order No. 436 has precisely this effect; it denies pipelines the right to make individualized decisions, in particular cases, as to whether and on what terms to provide transportation services.

b. The Natural Gas Act does not authorize the Commission to impose common carrier obligations.

In nearly fifty years of regulation under the NGA the Commission has never claimed, and until the opinion below the courts had never ascribed to the FERC, the authority to impose common carrier obligations on gas pipelines under the NGA. Relationships among companies in the natural gas industry were structured by individualized contracts. *See United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.,* 350 U.S. 332, 339 (1956); *Pennzoil Co.* v. *FERC,* 645 F.2d 360, 373 (5th Cir. 1981), *cert. denied,* 454 U.S. 1142 (1982). The Commission merely exercised veto power over contracts placed before it for certification. *See FPC* v. *Transcontinental Gas Pipe Line Corp.,* 365 U.S. 1, 17 (1961). Except in situations conforming to the requirements of section 7(a), which concerns sales service to local distribution companies immediately adjacent to existing pipeline facilities, the Commission had no power under the NGA to impose service obligations on interstate pipelines. *Panhandle Eastern Pipe Line Co.* v. *FPC,* 204 F.2d 675, 679-81 (3d Cir. 1953); *Panhandle Eastern Pipe Line Co.,* 15 F.P.C. 46, 56-59 (1956), *aff'd, Central West Util. Co.* v. *FPC,* 247 F.2d 306,

311 (3d Cir. 1957); *Consolidated Gas Co.*, 28 F.E.R.C. (CCH) ¶ 61,350 (1984). *See also Rural Energy Systems, Inc.*, 34 F.E.R.C. (CCH) ¶ 61,389 at 61,723 n.12 (1986) (§ 7(a) does not grant Commission authority to order a pipeline to provide transportation service); *Manufacturers Light & Heat Co.*, 39 F.P.C. 294 (1968) (§ 7(a) does not grant Commission authority to order one pipeline to serve another pipeline).

This view of the Commission's authority under the NGA was fully consistent with Congressional intent, which indicated that interstate gas pipelines should not be compelled to transport gas. In its first legislation pertaining to interstate pipelines — the Interstate Commerce Act of 1906 — Congress expressly exempted natural gas pipelines from the definition of common carriers. Pub. L. No. 59-337, 34 Stat. 584. Congress later rejected proposed amendments to the Interstate Commerce Act that would have made natural gas pipelines common carriers. *See* S. 3345, 63d Cong., 2d Sess., 50 Cong. Rec. 5847-49 (1913). In 1935, Congress considered a precursor of the NGA that contained provisions requiring natural gas companies to transmit gas for any person upon reasonable request and authorizing the Commission to order them to do so. H.R. 5423, 74th Cong., 1st Sess. §§ 303, 304 (1935). After extensive hearings the bill was never enacted. *See Hearings on H.R. 5423 Before the Comm. on Interstate and Foreign Commerce*, 74th Cong., 1st Sess. 1646 (1935).

Consistent with this legislative history and pattern of regulation under the NGA, the FERC refrained from asserting statutory authority to impose common carrier obligations in Order No. 436. The FERC stated "the Natural Gas Act does not expressly *require* pipelines to transport for others as an affirmative duty." Order No. 436 at 31,500-01. Rather than asserting the power to impose common carrier obligations, the FERC claimed it could "condition" its authorization of

transportation service on a pipeline's willingness to assume an affirmative duty to transport for others and to forgo its right to choose for whom it would provide service. *Id.* The FERC reasoned that open access was voluntary and that the issue of the FERC's statutory authority to impose common carrier obligations was not presented.

The court of appeals rejected the FERC's claim that open access was voluntary, aptly comparing a pipeline's predicament to choosing between death by hanging or by firing squad. JA at 81a. This shifted the focus of the case to the issue of the FERC's statutory authority to order mandatory open access transportation by pipelines for parties that the pipelines would not otherwise choose to serve. The decision of the court of appeals upholding the open access requirement therefore has much more significant ramifications than an affirmance on the basis of the Commission's reasoning, since it purports to extend the Commission's authority to encompass powers not previously attributed to the Commission.

The court reasoned that the Commission had the authority to impose common carriage obligations on pipelines under the NGA because the NGA does not explicitly deny the FERC such authority, and because the legislative history, though it contains several occasions in which Congress rejected proposals to impose common carriage obligations upon gas pipelines, was not sufficiently emphatic to bar the Commission from imposing such obligations. JA at 25a-27a. The court described the limits on the FERC's authority to impose common carrier obligations as "at best ambiguous." JA at 34a.

The court's rationale that the Commission had authority to impose common carrier obligations because such authority was not explicitly denied FERC is directly contrary to established principles of administrative law. For example, in

reviewing an order of the Civil Aeronautics Board, this Court stated that "the fact is that the Board is entirely a creature of Congress and the determinative question is not what the Board thinks it should do but what Congress has said it can do." *CAB* v. *Delta Air Lines, Inc.*, 367 U.S. 316, 322 (1961). *See also United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424, 430-31 (1947). Agencies possess only those powers expressly bestowed upon them, not all powers except those expressly denied them. Because the only power to compel service that Congress expressly bestowed upon the FERC was the limited authority contained in section 7(a), the Commission has no greater authority to compel service.

c. The Natural Gas Policy Act expressly bars the Commission from imposing common carrier obligations.

The NGPA is also devoid of authority to compel a regulated company to provide transportation service. Indeed, the NGPA explicitly denies the FERC authority to place upon pipelines an obligation to transport for all who request it. Section 602(b) states:

> (b) Common Carriers — No person shall be subject to regulation as a common carrier under any provision of Federal or State law by reason of any transportation . . . authorized by the Commission under section [311(a)] of this [Act].

15 U.S.C. § 3432(b) (1982).

The FERC has recognized this limitation on its authority under section 311(a) of the NGPA. In an early rulemaking order implementing section 311 the Commission stated:

> There is no indication in section 311(a)(1), or in its legislative history, that interstate pipelines were intended to be required to render transportation services. Indeed, section 602(b)(2) specifically states that no person shall become a common carrier by reason of section 311(a) transportation. Thus, the Commission is

> without authority to require transportation services by interstate pipelines solely by reason of section 311(a)(1).

Final Part 284 Regulations Under The Natural Gas Policy Act of 1978, 1977-81 FERC Reg's Preambles (CCH) ¶ 30,081 (1979). Similarly, in Order No. 436 the Commission did not directly assert authority to impose common carrier obligations under the NGPA, reasoning instead that pipelines would incur such obligations voluntarily.

The court of appeals, however, found that the FERC had authority to impose common carrier obligations in spite of the express prohibition of section 602(b). To do so the court was required to give section 602(b) a highly strained reading. The court stated that section 602(b) was meant to restate the obvious: that federal regulation of transportation under authority of section 311 preempted state regulation of the same transportation. JA at 35a-37a. The legislative history of the NGPA, which is silent on the subject of the intent of section 602(b), lends no support to this peculiar reading of the statute.

Moreover, the court of appeals' strained construction fails to explain why section 602(b) refers to "regulation as a common carrier under . . . *Federal or* State law." 15 U.S.C. § 3432(b) (1982) (emphasis added). The intent of section 602(b) is obvious on its face: to encourage pipelines to engage in the type of transportation authorized by section 311, Congress ensured that pipelines that did so would not be commandeered for the service of the interstate market by the imposition of common carrier obligations. Order No. 436 directly contravenes this Congressional assurance.

2. Certiorari should be granted to resolve a conflict between the decision of the court below and decisions of this Court and other circuits.

The court of appeals found that the Commission had authority to mandate open access transportation in the face

of contrary decisions by this Court and by the Fifth and Second Circuits. *See Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973) ("*Otter Tail*"); *Florida Power & Light Co.* v. *FERC*, 660 F.2d 668 (5th Cir. 1981), *cert. denied*, 459 U.S. 1156 (1983) ("*FP&L*"); *New York State Electric & Gas Corp.* v. *FERC*, 638 F.2d 388 (2d Cir. 1980), *cert. denied*, 454 U.S. 821 (1981) ("*NYSE&G*").

The *Otter Tail*, *FP&L* and *NYSE&G* cases concerned provisions of the Federal Power Act ("FPA") that are in *pari materia* with provisions of the NGA. *Compare* 16 U.S.C. §§ 824d-824e (1982) *and* 15 U.S.C. §§ 717c-717d (1982). The NGA was patterned after, and was intended to operate the same as, the FPA. *See City of Gainesville* v. *Florida Power & Light Co.*, 488 F. Supp. 1258, 1277 (S.D. Fla. 1980). Accordingly, this Court has treated the relevant provisions of the two statutes as being "in all material respects substantially identical," *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956), and has followed the "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 n.7 (1981). *See also Permian Basin Area Rate Cases*, 390 U.S. 747, 821 (1968).

In *Otter Tail* this Court reviewed a district court decree finding that Otter Tail's refusal to transmit or "wheel" electricity for municipal distribution companies constituted a violation of the antitrust laws and ordering Otter Tail to wheel power in the future. Otter Tail argued that the district court was barred from prescribing such a remedy because the area was preempted by the jurisdiction of the Commission under the FPA. This Court rejected Otter Tail's argument, stating that "so far as wheeling is concerned, there is no authority granted the Commission under Part II of the Federal Power Act to order it, for the bills originally

introduced contained common carrier provisions which were deleted." 410 U.S. at 375.

In *FP&L* the Fifth Circuit noted that the FPA did not expressly authorize the Commission to compel wheeling, and that Congress' rejection of amendments that would have imposed common carriage obligations on electric utilities indicated that Congress did not intend the Commission to have such power. 660 F.2d at 672-73.

In *NYSE&G* the Second Circuit observed:

> As originally enacted the FPA did not permit the Commission to compel wheeling. Prior to its enactment, provisions were proposed which would have required " 'every public utility to . . . transmit energy for any person upon reasonable request' " and would have "empowered the . . . Commission to order wheeling if it found such action to be 'necessary or desirable in the public interest.' . . . These provisions were eliminated to preserve 'the voluntary action of the utilities.' . . . Congress thereby revealed its preference for reliance on "voluntary commercial relationships" . . . .

638 F.2d at 401 (citations omitted). The court went on to conclude that the Commission could only compel service under the specific circumstances described in sections 211 and 212 of the FPA.

The conclusions of the courts in these FPA cases that the Commission could not impose common carriage service obligations were based on three factors also present here: (1) legislative history indicating Congressional rejection of common carriage provisions; (2) absence in the statute of language empowering the Commission to impose common carrier obligations; and (3) the presence in the statute of narrow provisions that empowered the Commission to compel service only under carefully limited circumstances (section 7(a) in the NGA, sections 211 and 212 in the FPA).

In the opinion below the court of appeals attempted to distinguish these cases interpreting the FPA. First, the court

made a perfunctory suggestion that perhaps the FPA and the NGA are not precisely in *pari materia*. The court asserted that the legislative history of the FPA indicating that Congress intended that the Commission not be authorized to compel wheeling was stronger than the indications in the history of the NGA that pipelines should also not be subject to common carriage requirements. But the legislative history relied upon in *Otter Tail, NYSE&G* and *FP&L* — failure to enact common carriage legislation applicable to electric utilities — is remarkably similar to the legislative history of the NGA, which includes several rejections by Congress of attempts to impose common carriage status on gas pipelines.

The court went on to state that while the cases interpreting the FPA may indicate that the Commission cannot compel service directly, they do not prohibit the Commission from compelling wheeling as a remedy for anticompetitive conduct. The *Otter Tail* facts, however, involved a conclusion by the district court, upheld by this Court, that Otter Tail had engaged in anticompetitive conduct. It was precisely in that context that this Court found that the Commission would not have the authority to compel wheeling. 410 U.S. at 376-77. Moreover, the Fifth Circuit in *FP&L* quoted this Court's decision in *FPC* v. *Conway Corp.*, 426 U.S. 271 (1976), for the proposition that the Commission may not take action as a remedy for anticompetitive conduct when it lacks authority to take such action directly: "The Commission has no power to prescribe the rates for retail sales of power companies. Nor, accordingly, would it have power to remedy an alleged discriminatory or anticompetitive relationship between wholesale and retail rates by ordering the company to increase its retail rates [sic]." 660 F.2d at 676 (quoting *FPC* v. *Conway Corp.*, 426 U.S. at 276-77).

The court's attempt to distinguish the cases interpreting the FPA on the basis that none of them presented the "extreme factual circumstances that are now present in the gas industry," JA at 30a, is unsupported by the record here.

Otter Tail, for example, involved a violation of the antitrust laws, yet this Court found that the Commission would not be authorized to compel wheeling under the circumstances.

Order No. 436, in contrast, does not rely on any particular factual circumstances, but instead proceeds on the assumption that any refusal to transport is *per se* unduly discriminatory. This assumption is faulty, since a refusal to provide new service is not unduly discriminatory. As the Fifth Circuit stated in *FP&L:*

> No case is cited, and we have found none, in which a utility which was refused wheeling services brought a petition under § 206(a) for the Commission to find such a refusal discriminatory where no tariff was on file.[19] We have serious doubts that such a petition would be successful in the absence of a tariff.
>
> ---
>
> [19] Nor have we found cases where applicants which were refused any other service have brought a claim of undue discrimination to the Commission where no tariff was on file.

660 F.2d at 675 and n.19.

The conflict among the circuits now presented to the Court was not brought into sharp focus until the decision below. The D.C. Circuit's own decision in *Richmond Power & Light Co.* v. *FERC,* 574 F.2d 610 (D.C. Cir. 1978) ("*RP&L*"), was in apparent agreement with the decisions of the Second and Fifth Circuits regarding the limits of the FERC's power to impose common carriage requirements under the FPA. In the opinion below, however, the court declared that *RP&L* had been modified by its decision in *Central Iowa Power Coop* v. *FERC,* 606 F.2d 1156 (D.C. Cir. 1979). Now that the conflict is squarely presented, this Court should grant certiorari to clarify the extent of the FERC's authority under the FPA and the NGA.

3. The Court should grant certiorari due to the broad economic implications of the decisions below.

This case is of extreme importance to the natural gas industry. The FERC's action "envisages a complete restructuring" of the industry. JA at 17a. The court of appeals itself observed that Order No. 436 "may well come to rank with the three great regulatory milestones of the industry: the passage of the Natural Gas Act in 1938, the imposition of price controls on independent producers' wellhead sales under *Phillips Petroleum Co.* v. *Wisconsin*, and adoption of the Natural Gas Policy Act in 1978." *Id.* (citations omitted).

The economic consequences of this restructuring are so great as to invest this case with national significance. As a result of Order No. 436, pipelines' sales have plummeted. These declines in sales have rendered pipelines unable to meet their purchase obligations to producers of gas, resulting in billions of dollars of contractual liability that is presently being litigated in courts all over the country. Exploration for new reserves and development of existing reserves have reached historic lows. These disruptions in the chain of supply portend ill for consumers in the future when energy supplies again become scarce. The disastrous effects of Order No. 436 will continue well into the future if this Court does not grant certiorari. Pipelines are now and in the coming years will be unable to secure contractual arrangements with producers necessary to ensure a supply sufficient to serve the nation's natural gas consumers.

At key junctures in the past, the Supreme Court has granted certiorari to review the Commission's expansion of its influence beyond previously accepted boundaries in cases of far-reaching economic significance. *See, e.g., Permian Basin Area Rate Cases*, 390 U.S. 747 (1968) (Commission's prescription of maximum area rates to regulate producers' interstate sales beginning new era of regulation); *Wisconsin* v. *FPC*, 373 U.S. 294 (1963) (proposed adoption of new area gas rate plan in lieu of previous individual company cost-of-

service approach), *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) (contention that under NGA natural gas companies had right to change their rate contracts unilaterally). The unprecedented and dramatic effects of the orders below warrant issuance of a writ of certiorari in this case as well.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

J. EVANS ATTWELL,
Counsel of Record
DAVID T. ANDRIL
D. VIRGINIA SMITH
Vinson & Elkins
1001 Fannin Street
Houston, Texas 77002-6760
(713) 651-2222

JUDY M. JOHNSON
Texas Eastern Transmission
Corporation
P.O. Box 2521
Houston, Texas 77252

Attorneys for Texas Eastern Transmission Corporation

December 14, 1987